Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ARRE KENNEDY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

I. Whether certiorari should be granted to resolve the conflict between the Fifth, Tenth and Eleventh Circuit Courts of Appeals, on the one hand, and the Fourth, Ninth, and now the Sixth Circuits, on the other hand, over whether the inevitable discovery exception to the Fourth Amendment exclusionary rule requires that, at the time of the unlawful search at issue, a separate independent line of investigation must have been underway?

II. Whether the inevitable discovery exception to the Fourth Amendment exclusionary rule applies where, at the time of the unlawful search at issue, a separate independent line of investigation was not underway and the lawful discovery of the evidence seized in the unlawful search was anything but inevitable and far from the sort of "historical fact" this Court contemplated in *Nix v. Williams*, 467 U.S. 431 (1984)?

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WHERE, AT THE TIME OF THE UNLAWFUL SEARCH AT ISSUE, A SEPARATE INDEPENDENT LINE OF INVESTIGATION WAS NOT UNDERWAY AND THE LAWFUL DISCOVERY OF THE EVIDENCE SEIZED IN THE UNLAWFUL SEARCH WAS ANYTHING BUT INEVITABLE AND FAR FROM THE SORT OF "HISTORICAL FACT" THIS COURT CONTEMPLATED IN *NIX V.WILLIAMS*, 467 U.S. 431 (1984)? 14

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No. _____

ARRE KENNEDY,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Arre Kennedy, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on August 7, 1995 is reported at 61 F.3d 494 (6th Cir. 1995) and is reproduced in the Petitioner's Appendix hereto at Pet. App. at 1.

The Order of the United States District Court, Eastern District of Michigan denying the Petitioner's Motion to Suppress was entered on April 1, 1994. *See* Pet. App. at 19.

The Order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on September 25, 1995. *See* Pet. App. at 26.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 7, 1995. A timely Petition for Rehearing was denied on September 25, 1995. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

i) Course of Proceedings and Disposition Below

On July 25, 1993, officers of the Metropolitan Washington Airport Authority Police Department at Washington's National Airport conducted a warrantless search of a black suitcase belonging to the Petitioner, Arre Kennedy. They discovered that the suitcase contained cocaine. DEA agents then arranged for a controlled delivery of the suitcase to Petitioner Kennedy at Miami International Airport. When the Petitioner subsequently attempted to pick up the suitcase at the baggage claim area of Miami International Airport, he was arrested.

On August 26, 1993, a federal grand jury returned a two-count indictment against the Petitioner charging him with conspiracy to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. Sections

841(a)(1) and 846 (Count One) and with possession of cocaine with intent to distribute in violation of 21 U.S.C. Sections 841(a)(1)(Count Two).

The Petitioner moved to suppress the cocaine seized from his black suitcase without a warrant and all the evidence that resulted therefrom.

The district court held an evidentiary hearing on the Petitioner's motion to suppress. Following the evidentiary hearing, the district court orally stated that, in its opinion, the warrantless search of the Petitioner's suitcase violated the Fourth Amendment and the inevitable discovery exception to the exclusionary rule was not applicable. However, on April 1, 1994, the district court entered a written order denying the Petitioner's motion to suppress based upon the inevitable discovery exception to the exclusionary rule. The district court found that the inevitable discovery exception to the exclusionary rule applied because, pursuant to the airline's lost luggage policy, an airline employee would have inevitably opened the black suitcase and discovered the cocaine in a private search.

On May 13, 1994, the Petitioner entered a conditional plea of guilty to Count One of the Indictment, reserving the right to appeal the denial of his motion to suppress pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. The government agreed to dismiss Count Two of the Indictment at sentencing.

On August 26, 1994, the district court dismissed Count Two of the Indictment and then sentenced the Petitioner to the statutory mandatory minimum of 120

months imprisonment, five years of supervised release, a fine of $5,000.00 and a special assessment of $50.00. The district court granted the Petitioner bond pending appeal and, in so doing, noted that the issue to be presented on appeal was a close question. Kennedy timely filed a notice of appeal.

On August 7, 1995, the United States Court of Appeals for the Sixth Circuit held that the inevitable discovery exception to the exclusionary rule was properly applied by the district court in denying the Petitioner's motion to suppress and affirmed the Petitioner's conviction. The Petitioner's timely Petition for Rehearing with suggestion for a Rehearing *En Banc* was denied on September 25, 1995.

ii) Statement of Facts.

On July 25, 1993, Petitioner Kennedy flew from Detroit, Michigan, to Miami, Florida, on Northwest Airlines Flight 991. He checked two locked pieces of luggage, a blue suitcase and a black suitcase. Northwest mistakenly labeled the Petitioner's suitcases with tags bearing the name of Wesley Kennedy, a Northwest passenger unrelated to Petitioner Kennedy. As a result, the Petitioner's suitcases were misrouted and sent to National Airport in Washington, D.C. At National Airport, Wesley Kennedy, who had flown from Detroit to Washington, discovered that his own bag was missing and reported the problem to Northwest employee, Deborah Hawkins-Garner. Hawkins-Garner showed the

Petitioner's two suitcases, each of which had a tag bearing the initials A-W-K in the same handwriting, to Wesley Kennedy, who informed her that the suitcases were not his.

Northwest's policy regarding lost luggage was to open lost suitcases to check for identification, and if there was no identification, to inventory the contents. Pursuant to that policy, Hawkins-Garner decided to open the suitcases to see if they contained any identification. She was unable to open the black suitcase because it had a combination lock. However, she was able to open the blue suitcase since it had a lock that could be opened with a Northwest key. The blue suitcase contained $176,000. Hawkins-Garner showed a co-worker the suitcase containing the currency and the co-worker immediately telephoned the Metropolitan Washington Airport Authority Police Department and reported the suitcases.

Officer Simon Mantel answered the call and was later joined by Sergeant Arthur Taplett. After observing the blue and black suitcases, Sergeant Taplett telephoned another airport police sergeant who was on duty with him that day and told him to call the Drug Enforcement Administration ("DEA"). Sergeant Taplett was suspicious of the contents of the black suitcase because a strong odor of perfume was emanating from it. Sergeant Taplett believed the perfume odor might be a device to mask the odor of the narcotics. He was also concerned that the suitcase might contain explosives. Accordingly, Sergeant Taplett had it x-rayed, which revealed a number of dense, rectangular-shaped objects with an almost metallic appearance, although

approximately one-fourth of the contents was indiscernible. Based upon the x-ray, the airport police concluded that the suitcase did not contain explosives. Officer Mantel remained with the suitcase while Sergeant Taplett began making arrangements to move the suitcase to the airport police station.

Sergeant Taplett testified that, at that point, he would not have relinquished custody and control of the black suitcase to Northwest Airlines or to the suitcase's owner. Sergeant Taplett testified that, at that point, he had already reported the suitcases to the DEA, was arranging to transport the suitcases to the airport police station, and intended to turn over the investigation concerning the suitcases to the DEA.

While Sergeant Taplett was making arrangements to move the suitcases to the airport police station using additional police officers, Hawkins-Garner asked Officer Mantel if he wanted to open the black suitcase, and Officer Mantel responded, "Well, I don't think I can." Hawkins-Garner then asked Officer Mantel to break open the lock on the black suitcase. Officer Mantel called Sergeant Taplett on the radio and told Sergeant Taplett that Hawkins-Garner had asked him to open the black suitcase and asked Sergeant Taplett "if there was a problem with that." Despite the fact that no search warrant had been obtained, Sergeant Taplett gave permission to Officer Mantel to open the black suitcase. Officer Mantel then forced open the lock on the black suitcase using a screwdriver and found a number of brick-shaped objects wrapped in brown duct tape.

Shortly thereafter, DEA agents arrived and determined that the black suitcase contained 17 kilograms of cocaine and 77 grams of cocaine base.

Just minutes after Officer Mantel forcibly opened the black suitcase, Northwest Airlines in Washington, D.C., was notified that the Petitioner had arrived in Miami and was asking for his suitcases. DEA agents arranged for a controlled delivery of the suitcases to the Petitioner and arrested him.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIFTH, TENTH AND ELEVENTH CIRCUIT COURTS OF APPEALS ON THE ONE HAND, AND THE FOURTH, THE NINTH, AND NOW THE SIXTH CIRCUITS, ON THE OTHER HAND, OVER WHETHER THE INEVITABLE DISCOVERY EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE REQUIRES THAT, AT THE TIME OF THE UNLAWFUL SEARCH AT ISSUE, A SEPARATE INDEPENDENT LINE OF INVESTIGATION MUST HAVE BEEN UNDERWAY.

The exclusionary rule prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment, as well as derivative evidence acquired as a result of an unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). The inevitable discovery doctrine, an exception to the exclusionary rule, allows unlawfully obtained evidence to be admitted at trial if the government can prove by a preponderance that the evidence inevitably would have been acquired by lawful means. *Nix v. Williams*, 467 U.S. 431,

444 (1984). For the inevitable discovery exception to apply, it must be demonstrated that the unlawfully obtained evidence inevitably would have been acquired through lawful means had the government misconduct not occurred. *Id.* at 444. Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification . . ." *Nix*, 467 U.S. at 444 n.5.

The Court of Appeals below held that the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate *either* the existence of an independent, untainted investigation that was being pursued at the time of the unlawful search and inevitably would have uncovered the same evidence, *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered in any event. *See* Pet. App. at 13. Therefore, the Court of Appeals held that the inevitable discovery exception to the exclusionary rule does not require that, at the time of an unlawful search, a separate independent line of investigation must have been underway. *See* Pet. App. at 13. In so holding, the Court of Appeals observed that "whether an independent line of investigation is required for the inevitable discovery exception apply is a question that has divided the circuits." *See* Pet. App. at 8.

Indeed, some circuits have refused to apply the inevitable discovery exception absent a previously initiated independent line of investigation. *See, e.g., United States v. Owens*, 782 F.2d 146, 152-153 (10th Cir. 1986)(refusing to apply the inevitable discovery exception because at the time

the evidence was illegally discovered, there was no independent, untainted investigation that inevitably would have uncovered the same evidence); *United States v. Cherry*, 759 F.2d 1196, 1205-06 (5th Cir. 1985)(holding that "[i]n order for the [inevitable discovery] exception to apply, the prosecution must demonstrate both a reasonable possibility that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation"), *cert. denied*, 479 U.S. 1056 (1987); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)(stating that "if evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred"), *cert. denied*, 471 U.S. 1117 (1985).

Other circuits, however, have rejected this requirement. *See, e.g., United States v. Thomas*, 955 F.2d 207, 210-11 (4th Cir. 1992) (rejecting the requirement that there be an alternative line of investigation for the inevitable discovery exception to apply), *cert. denied*, 115 S.Ct. 98 (1994); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989)(holding that the inevitable discovery exception does not require that the tainted evidence be obtained from a previously initiated, independent investigation).

The question of whether the inevitable discovery exception requires the Government to prove that an alternate independent line of investigation was underway at the time the illegality occurred is an important one for

purposes of inevitable discovery analysis. For example, in the case *sub judice*, at the time of the unlawful warrantless search of the black suitcase by Officer Mantel, a separate independent private investigation by Northwest Airlines was not underway. The suitcase was in the custody and control of the police. The Northwest airlines employee had contacted the police and turned to them to investigate both the blue and black suitcases. The airport police sergeant had already contacted the DEA and had gone to his office at the airport to make arrangements for additional police officers to come to the baggage room to move the two suitcases to the airport police station. The airport police sergeant testified that, at the time that Officer Mantel forcibly opened the black suitcase, the airport police had taken control of the blue and black suitcases and would not have released them to Northwest Airlines, but, instead, would have turned them over to the DEA for them to decide what action should be taken.

Accordingly, at the time of the unlawful search of the black suitcase by Officer Mantel, Northwest Airline's investigation of the black suitcase had merged with the airport police's investigation and a *separate independent private* line of investigation by Northwest Airlines was not underway. *See United States v. Grant*, 920 F.2d 376, 389 (6th Cir. 1990)(holding that, where the police are jointly involved with a private party in an investigation, the investigation can no longer be deemed to be a private investigation); *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992)(same),

cert denied, 115 S.Ct. 98 (1994). Indeed, the Court of Appeals below noted that:

> It is undisputed that there was no independent line of investigation underway at the time of the warrantless search of the black suitcase by the airport police.

Pet. App. at 13.

Thus, in the case *sub judice*, the issue of whether the inevitable discovery exception requires that an alternate independent line of investigation must have been underway at the time the illegality occurred had a direct effect on the outcome of the appeal -- had there been a requirement of an ongoing independent line of investigation, the Petitioner's conviction would have been reversed; had no such requirement existed, the Petitioner's conviction would have been affirmed.

Moreover, the resolution of this issue will affect the outcome of other criminal cases where the government seeks to admit illegally obtained evidence under the inevitable discovery exception to the exclusionary rule, but, at the time of the illegal search by which the evidence was obtained, no independent line of investigation was underway. As such, and in view of the conflict in the circuits, this issue is ripe for review by this Court.

II.

CERTIORARI SHOULD BE GRANTED TO ANSWER AN IMPORTANT QUESTION OF THE SCOPE AND LIMITS OF THE INEVITABLE DISCOVERY EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE: DOES THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE APPLY WHERE, AT THE TIME OF THE UNLAWFUL SEARCH AT ISSUE, A SEPARATE INDEPENDENT LINE OF INVESTIGATION WAS NOT UNDERWAY AND THE LAWFUL DISCOVERY OF THE EVIDENCE SEIZED IN THE UNLAWFUL SEARCH WAS ANYTHING BUT INEVITABLE AND FAR FROM THE SORT OF "HISTORICAL FACT" THIS COURT CONTEMPLATED IN *NIX V. WILLIAMS*, 467 U.S. 431 (1984)?

As noted earlier herein, in *Nix v. Williams*, 467 U.S. 431 (1984), this Court adopted the inevitable discovery exception to the exclusionary rule, holding that evidence can be admitted even though it was obtained unlawfully, when the Government proves that discovery of the evidence by independent lawful means was inevitable. In *Nix*, this Court made it clear that inevitable discovery analysis requires courts to determine what would have happened *had the*

unlawful search not occurred. This Court indicated that, in making this determination, courts are to look at the circumstances that existed *the instant before the unlawful search.* This Court explained that the rationale for the inevitable discovery exception is that police who commit unlawful searches should be put "in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." 467 U.S. at 443. Logically, the only way for a court to determine what position police would have been in had they not engaged in unlawful conduct is for a court to consider the circumstances that existed *the instant before the unlawful conduct occurred.* Accordingly, under *Nix* and its progeny, inevitable discovery analysis requires courts to focus on "*affairs as they existed at the instant before the unlawful search ....*" *United States v. Eng,* 971 F.2d 854, 861 (2d Cir. 1992) (Emphasis added).

This Court, in *Nix,* further held that "inevitable discovery *involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . .*" 467 U.S. at 444 n.5 (emphasis added). Therefore, a number of Circuit Courts of Appeals, following *Nix,* have refused to apply the inevitable discovery exception to the exclusionary rule unless it is in fact certain that the disputed evidence would have been lawfully obtained had it not been for the illegal search. *See United States v. Owens,* 782 F.2d 146, 152-153 (10th Cir. 1986)(court refused to apply the inevitable discovery rule where the government speculated that evidence seized in an unlawful search might have been discovered in a private search; "[w]e recognize

the danger of admitting unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway . . ."); *United States v. Finucan*, 708 F.2d 838, 842-43 (1st Cir. 1983)(refusing to apply inevitable discovery rule because "inevitable discovery exception to exclusionary rule should only be applied where it is in fact certain that evidence would have been lawfully obtained had it not been for illegal search"); *United States v. $639,558.00 in U.S. Currency*, 955 F.2d 712, 721 (D.C. Cir. 1992)(citation omitted)(refusing to apply inevitable discovery rule because the lawful discovery of evidence unlawfully seized from defendant's luggage "was anything but inevitable" and "[f]ar from being the sort of 'historical fact' *Nix* contemplated, it was merely hypothetical").

The Court of Appeals below, however, held that the inevitable discovery exception to the exclusionary rule applied to the unlawful search of the Petitioner's briefcase even though, at the time of the unlawful search, the lawful discovery of the evidence seized in the unlawful search was, at best, hypothetical and was far from the sort of "historical fact" this Court contemplated in *Nix v. Williams*, 467 U.S. 431 (1984). More specifically, the Court of Appeals below held as follows:

> Prior to the intervention of the airport police, [Northwest Airlines employee] Hawkins-Garner had already decided to open the suitcases pursuant to Northwest's policy of opening lost luggage. Even after the airport police arrived, Hawkins-Garner still thought

> she should open the suitcase because she considered it to be in Northwest's custody. Hawkins-Garner testified that she would have opened the suitcase herself or had another employee to do so if Officer Mantel had not opened it for her. Therefore, it is clear that, pursuant to Northwest's lost luggage policy, Hawkins-Garner would have opened the black suitcase and discovered the evidence in a private search had the airport police not become involved. Because a private search was inevitable, the cocaine is admissible pursuant to the inevitable discovery exception to the exclusionary rule.

See Pet. App. at 15-16.

However, *viewing affairs as they existed at the instant before the unlawful search of the suitcase,* a "private search" of the suitcase by Hawkins-Garner was anything but inevitable and was far from the sort of "historical fact" this Court contemplated in *Nix v. Williams*, 467 U.S. 431 (1984). At the instant before the unlawful search occurred, the following circumstances undisputedly existed:

(1) Northwest Airlines personnel had turned to the airport police to investigate the unclaimed suitcases.

(2) Sergeant Taplett, the supervisor of the airport police department, had reported the suitcases to the DEA.

(3) Sergeant Taplett was making arrangements to move the suitcases to the airport police station.

(4) According to the unequivocal testimony of Sergeant Taplett, at the moment before the unlawful search occurred, he would not have relinquished custody and control of the suitcases to Northwest Airlines or to the suitcase's owner. Rather, at that point, he had already reported the suitcases to the DEA, was arranging to transport the suitcases to the airport police station, and intended to turn over the investigation of the suitcases to the DEA.

Thus, a *private* search by Northwest Airlines was not inevitable because, as evidenced by the above-described circumstances, at the instant before the unlawful search, Northwest Airlines' investigation had merged with the airport police's investigation, and the airport police were not going to relinquish complete custody and control of the suitcase back to Northwest so as to enable Hawkins-Garner, or any other airline employee, to open the suitcase in a separate and independent private search.

Notably, a search by a private party does not qualify as a private search where, at the time of the search by the private party, the police are jointly involved with the private party in the investigation of the item searched. *See e.g. United States v. Grant*, 920 F.2d 376, 389 (6th Cir. 1990); *United States v. Thomas*, 955 F.2d 207 (4th Cir. 1992). In

Grant, *supra*, airlines personnel reported a suspicious lost bag to the police, who then attempted to obtain a warrant to search the bag. The police, however, were unable to obtain a search warrant, so they terminated their investigation of the bag and returned it to airlines personnel. The airlines personnel refused to return the bag to its owner until determining its contents and asked the police to open it for them. The police, at the request of airlines personnel, then opened the bag for them without a warrant and found that the bag contained drugs. The Sixth Circuit held that the drugs found in the luggage should be suppressed and that, *where a search of luggage occurs during a joint investigation by the airlines and the police, the search of the luggage is not private.*

After the Court of Appeals below held that the existence of Northwest Airline's policy of opening lost luggage made it inevitable that the disputed evidence would have been discovered in a private search, the Court of Appeals further stated as follows:

> Defendant argues that the police would not have relinquished control of the suitcase to Northwest, and, thus, Hawkins-Garner would not have had the opportunity to open the suitcase. Assuming *arguendo* that defendant is correct and the airport police and/or DEA had kept the suitcase, the result would have been the same. The law enforcement officers would have applied for a search warrant. If a warrant had issued, the officers would have

> conducted a search pursuant to that warrant; if a warrant had not issued, Northwest would have conducted a private search after the suitcase had been returned. In either case, a search inevitably would have been conducted, and the cocaine would have been discovered.

See Pet. App. at 17-18.

This holding of the Court of Appeals below was, yet again, based on speculation rather than "historical facts capable of ready verification or impeachment." *See Nix v. Williams*, 467 U.S. at 444 n.5. The Court of Appeals below reasoned that, if the airport police and/or DEA had kept the suitcase, and applied for a search warrant but had not been able to obtain a warrant, Northwest would have conducted a private search after the suitcase had been returned. However, just *minutes* after Officer Mantel forcibly opened the suitcase, Northwest Airlines in Washington, D.C. was notified that the Petitioner had arrived in Miami and was asking for his suitcases. Accordingly, if the airport police and/or DEA had been unsuccessful in obtaining a search warrant for the black suitcase, by the time they returned the suitcase to Northwest Airlines, the suitcase would no longer have been lost, and, therefore, Northwest could not have opened it in a private search pursuant to its policy of opening lost luggage.

The Court of Appeals below also reasoned that the police *might* have been able to obtain a search warrant had the unlawful search not occurred. Clearly, however the inevitable discovery doctrine does not permit the admission

of evidence unlawfully obtained without a warrant so long as the police *might* have been able to ultimately obtain a warrant. Indeed, if such were the case, the effect would be to destroy the Fourth Amendment warrant requirement because every warrantless non-exigent search automatically would be legitimated by assuming the hypothetical alternative that a warrant might have been obtained.

In sum, had the police kept the black suitcase as the evidence demonstrated they would have done, one can only speculate as to whether or not a warrant for the black suitcase would have issued and whether or not the suitcase would have been opened in a private search had a warrant not issued. Under *Nix*, 467 U.S. at 444 n.5, speculation has no place in inevitable discovery analysis. Accordingly, because of the apparent confusion regarding the scope and limits of the inevitable discovery exception to the Fourth Amendment exclusionary rule, as evidenced by the decision of the Court of Appeals below, this Court should grant certiorari to clarify what this Court meant in *Nix* when it stated that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment..." *Id.*

CONCLUSION

For all the foregoing reasons, therefore, the Petitioner respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARRE KENNEDY,
Defendant-Appellant.
No. 94-1985

United States Court of Appeals
Sixth Circuit
August 7, 1995

Appeal from the United States District Court for the Eastern District of Michigan.

Before MILBURN and BATCHELDER, Circuit Judges; TODD, District Judge

*The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

TODD, District Judge. Defendant appeals his conviction following a conditional plea of guilty to a charge of conspiracy to distribute and to possess with the intent to distribute cocaine in violation of 21 U.S.C. Sections 841(a)(1) and 846. On appeal, the only issue is whether cocaine seized in a warrantless search of defendant's suitcase was admissible under the inevitable discovery

exception to the exclusionary rule. For the reasons set forth below, we AFFIRM the judgment of the district court.

I.

A.

On July 25, 1993, defendant Arre Kennedy flew from Detroit, Michigan, to Miami, Florida on Northwest Airlines flight 991. Defendant checked two locked pieces of luggage, a blue suitcase and a black suitcase. Northwest mistakenly labeled defendant's suitcases with tags bearing the name of Wesley Kennedy, a Northwest passenger unrelated to defendant. As a result, defendant's suitcases were misrouted and sent to National Airport in Washington, D.C. At National Airport, Wesley Kennedy, who had flown from Detroit to Washington, discovered that his own bag was missing and reported the problem to Northwest employee, Deborah Hawkins-Garner. Hawkins-Garner showed defendant's two suitcases, each of which had a tag bearing the initials A-W-K, to Wesley Kennedy who informed her that the suitcases were not his.

Northwest's policy regarding lost luggage was to open the suitcase to check for identification and, if there was no identification, to inventory the contents. Pursuant to that policy, Hawkins-Garner decided to open the suitcases to see if they contained any identification. She was unable to open the black suitcase because it had a combination lock. However, she was able to open the blue suitcase since it had a lock that could be opened with a Northwest key. The blue suitcase contained $176,000, which was promptly

reported to the Metropolitan Washington Airport Authority Police Department.

Officer Simon Mantel answered the call and was later joined by Sergeant Arthur Taplett. Sergeant Taplett was suspicious of the contents of the black suitcase because a strong odor of perfume was emanating from it. Because of a concern that the suitcase might contain explosives, Sergeant Taplett had it x-rayed, which revealed a number of dense, rectangular-shaped objects with an almost metallic appearance, although approximately one-fourth of the contents was indiscernible. Officer Mantel remained with the suitcases while Sergeant Taplett began making arrangements to move the suitcases to the airport police station.

At that point, Hawkins-Garner decided to go ahead and open the black suitcase. After receiving permission from her supervisor to open the bag, she obtained a hammer and a screwdriver and asked Officer Mantel to open it for her. He advised Sergeant Taplett on the radio that Hawkins-Garner had asked him to open the black suitcase and asked if there was a problem with that. Sergeant Taplett replied that Officer Mantel could open the suitcase if Northwest wanted it open. Officer Mantel then used the hammer and screwdriver to force open the lock on the suitcase. Inside were a number of rectangular-shaped packages wrapped in brown duct tape. Officer Mantel did not try to open the packages.

In response to an earlier phone call from another airport police sergeant, Special Agent Ed Curley of the Drug Enforcement Administration ("DEA") arrived. He

suspected that the suitcase contained drugs based on the packaging and the presence of the perfume odor. Agents conducted a field test on the contents of one of the packages and established that it contained 17 kilograms of cocaine and 77 grams of cocaine base.

Shortly thereafter, Northwest in Washington, D.C., was notified that defendant had arrived in Miami and was looking for his suitcases. DEA agents arranged for a controlled delivery of the suitcases to defendant. The next day, defendant and his son picked up the suitcases in Miami. As they were leaving, agents arrested Defendant after he admitted that the suitcases belonged to him. Defendant confessed that he had been trafficking drugs from Miami to Detroit for several months. A consensual search of defendant's home produced an additional $225,000 in cash.

B.

On August 26, 1993, a federal grand jury returned a two-count indictment against defendant charging him with conspiracy to distribute and to possess with the intent to distribute cocaine in violation of 21 U.S.C. Sections 841(a)(1) and 846 and with possession of cocaine with intent to distribute in violation of 21 U.S.C. Section 841(a)(1).

Defendant moved to suppress the cocaine seized from his black suitcase and all the evidence that resulted therefrom. The district court held an evidentiary hearing and denied the motion based on the inevitable discovery exception to the exclusionary rule.

On May 13, 1994, defendant entered a conditional plea of guilty to conspiracy to distribute cocaine, reserving

his right to appeal the denial of his motion to suppress pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. The government agreed to dismiss the possession count at sentencing. On August 26, 1994, the district court sentenced defendant to the statutory mandatory minimum of 120 months imprisonment, five years of supervised release, a fine of $5,000, and a special assessment of $50. The district court granted defendant bond pending appeal. This timely appeal followed.

II.

Defendant contends that the district court erred in denying his motion to suppress because the government failed to establish that the cocaine inevitably would have been discovered by lawful means. "[T]his court reviews a district court's decision on a motion to suppress under two complimentary standards." *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir. 1993). "A district court's factual findings made in consideration of a motion to suppress evidence are to be upheld unless they are clearly erroneous. However, the district court's conclusions of law are subject to de novo review on appeal. The reviewing court is to review the evidence 'in the light most likely to support the district court's decision.'" *United States v. Williams*, 962 F.2d 1218, 1221 (6th Cir.) (citations omitted), *cert. denied*, 113 S.Ct. 264 (1992). Mixed questions of law and fact are reviewed de novo. *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993). Because we believe the applicability of the inevitable discovery exception to this case is a mixed question, we shall review the district court's decision de

novo. *See United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987) (panel implicitly reviewed the application of the inevitable discovery doctrine de novo by its extensive review of the facts and doctrine itself).

The exclusionary rule prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment, as well as derivative evidence acquired as a result of an unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). The inevitable discovery doctrine, an exception to the exclusionary rule, allows unlawfully obtained evidence to be admitted at trial if the government can prove by a preponderance that the evidence inevitably would have been acquired through lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). In approving the inevitable discovery exception, the Supreme Court reasoned that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Id.*

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is

> no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.

Id., at 447. Therefore, when "the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id.*, at 448.

For the inevitable discovery exception to apply, it must be demonstrated that the evidence inevitably would have been acquired through lawful means had the government misconduct not occurred. *Id.*, at 444; *see Murray v. United States*, 487 U.S. 533, 539 (1988). Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." *Nix*, 467 U.S. at 444 n.5. "The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 693. With these general principles in mind, we turn to defend-

ant's arguments on appeal.

Defendant acknowledges that the inevitable discovery exception applies when, at the time of the unlawful search, there was a separate independent line of investigation underway or there are compelling facts indicating that the disputed evidence would have inevitably been discovered, such as proof that the evidence would have been found in an inventory search that would inevitably follow seizure of a car. *See United States v. Johnson*, 22 F.3d 674, 684 (6th Cir. 1994) and *United States v. Buchanan*, 904 F.2d 349, 356-57 (6th Cir. 1990). Defendant argues that his motion to suppress should have been granted because, at the time of the search, there was no independent investigation underway nor are there historical facts demonstrating that a private search was inevitable.[1]

Whether an independent line of investigation is required for the inevitable discovery exception to apply is a question that has divided the circuits. Some circuits have refused to apply the inevitable discovery exception absent an independent line of investigation. *See, e.g., United States v. Owens*, 782 F.2d 146, 152-53 (10th Cir. 1986)(refusing to apply the inevitable discovery exception because at the time the evidence was illegally discovered, there was no independent, untainted investigation that inevitably would have

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[1] The government has conceded that the search which actually occurred was not a private search pursuant to this court's holding in *United States v. Grant*, 920 F.2d 376, 388 (6th Cir. 1990). Appellee's Brief at 11, n.3.

uncovered the same evidence); *United States v. Cherry*, 759 F.2d 1196, 1205-06 (5th Cir. 1985)(holding that "[i]n order for the [inevitable discovery] exception to apply, the prosecution must demonstrate both a reasonable possibility that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation"), *cert. denied*, 479 U.S. 1056 (1987); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)(stating that "if evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred"), *cert. denied*, 471 U.S. 1117 (1985).

Other circuits, however, have rejected this requirement. *See, e.g., United States v. Thomas*, 955 F.2d 207, 210-11 (4th Cir. 1992)(rejecting the requirement that there be an alternative line of investigation for the inevitable discovery exception to apply), *cert. denied*, 115 S.Ct. 98 (1994); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989)(holding that the inevitable discovery exception does not require that the tainted evidence be obtained from a previously initiated, independent investigation); *United States v. Fitzharris*, 633 F.2d 416, 421 (5th Cir. 1980)(allowing the admission of evidence that was initially obtained through an illegal search when a valid warrant was subsequently obtained on the ground that the evidence inevitably would have been discovered under the warrant), *cert. denied*, 451 U.S. 988 (1981). Although this court has considered

this issue at least twice, it has never addressed it directly. *See United States v. Johnson*, 22 F.3d 674, 684 (6th Cir. 1994) and *United States v. Buchanan*, 904 F.2d 349, 356-57 (6th Cir. 1990).

Buchanan involved the admissibility of evidence seized by drug enforcement agents during a warrantless search of the defendant's residence. *Buchanan*, 904 F.2d at 350. The government, relying on *United States v. Webb*, 796 F.2d 60, 62 (5th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987), argued that the inevitable discovery exception permits admission of the evidence if the government can satisfy the following three-part test:

> (1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct; (2) that the police possessed the leads making the discovery inevitable at the time of the misconduct; and (3) that the police were actively pursuing [an] alternate line of investigation prior to the misconduct.

Id., at 356.

Because the agents were not pursuing an alternate line of investigation, this court rejected the government's claim that the three-part test was satisfied. "[P]rior to initiating the warrant application for the [defendant's] residence, the agents made an illegal entry into the home which 'tainted the only . . . investigation that was ongoing.'" *Id.*, at 357 (quoting *United States v. Owens*, 782 F.2d 146, 152 (10th Cir. 1986). *Buchanan* did not adopt the three-part

test advanced by the government as a necessary requirement to the application of the inevitable discovery exception. Instead, it simply rejected the government's argument that the inevitable discovery exception permitted admission of the evidence under the three-part test. *Id.* at 356-57.[2]

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[2] In *Buchanan*, this court relied in part on the reasoning in *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir.)(per curiam), *cert. denied*, 419 U.S. 1050 (1974), which held that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." *Griffin*, 502 F.2d at 961. In *Griffin* the inevitable discovery exception was not applied because the police intentionally took a shortcut in an attempt to bypass the Fourth Amendment warrant requirement - in effect, the police conducted an illegal search to determine whether it would be worthwhile to obtain a search warrant. *Id.*

Under *Murray v. United States*, 487 U.S. 533 (1988), the holding in *Griffin* must be narrowly applied. *Murray* held that the Fourth Amendment does not require suppression of evidence initially discovered during a police officer's illegal search if that evidence is also discovered during a later search pursuant to a valid warrant that was obtained independently of the illegal search. Therefore, although we adhere to the position that intentional shortcuts to the warrant requirement cannot be tolerated, we limit its application under *Murray* to facts similar to those in *Griffin*. *See United States v. Straughter*, 950 F.2d 1223, 1231 (6th Cir.

United States v. Johnson, 22 F.3d 674 (6th Cir. 1994), clarifies the point. *Johnson*, which involved the admissibility of guns seized by police during a warrantless search of the defendant's apartment, did not fit *Nix* because "there was no other independent line of investigation or compelling facts illustrating that the guns would have inevitably been discovered." *Id.*, at 684. This court quoted with approval *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987), which held that the inevitable discovery exception does not require that the tainted evidence be obtained from a previously initiated, independent investigation:

> "There will be instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case. In such cases, the inevitable discovery doctrine will permit introduction of the evidence whether or not two independent investigations were in progress."

Johnson, 22 F.3d 684 (quoting *Boatwright*, 822 F.2d at 864).

1991)(recognizing that "the Fourth Amendment does not require the suppression of evidence initially discovered during an illegal entry if that evidence is seized during a later search pursuant to a warrant that is not based on evidence obtained during the illegal entry"), *cert. denied*, 112 S.Ct. 1601 (1992).

These cases lead to the conclusion that the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate *either* the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered. Therefore, we hold that an alternate, independent line of investigation is not required for the inevitable discovery exception to apply. We now turn to the facts of this case.

It is undisputed that there was no independent line of investigation underway at the time of the warrantless search of the black suitcase by the airport police. Therefore, we must determine whether the district court erred in finding that there were compelling facts establishing that the disputed evidence inevitably would have been discovered in any event.

In denying the motion to suppress, the district court stated:

> The police misconduct in this case was the warrantless search of the black suitcase, thus the Court must consider what would have happened had the illegal search not occurred. Had the police acted lawfully, once the bag was seized and it was determined that it posed no danger of exploding, they would have sought a search warrant. The government concedes that under the facts of this case, it is unlikely that a search warrant would

> have been issued . . . If the police had been unable to secure a warrant, they would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase, pursuant to its lost luggage policy, in an effort to locate its owner.

J.A. 21. The district court then determined that "[t]he proper application of the inevitable discovery rule can only lead to the conclusion that, absent the illegal retention . . . of the suitcase, the airport police would have returned the suitcase to Northwest, which would have searched it." J.A. 22. The court concluded that, because an identification search by Northwest would have been a search by a private entity, the Fourth Amendment would not have been violated. Therefore, the district court ruled that the cocaine discovered in the search and the evidence derived therefrom were admissible under the inevitable discovery exception.

In *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989), the Ninth Circuit held that the government can meet its burden of showing that the tainted evidence inevitably would have been discovered through lawful means "by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence." In that case, the court cited two cases involving evidence that inevitably would have been discovered pursuant to a standard procedure. *See United States v. Martinez-Gallegos*, 807 F.2d 868, 870 (9th Cir. 1987)(information inevitably would have been obtained as next step by

consulting defendant's immigration file even absent unwarned statements); *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986)(evidence inevitably would have been discovered by following routine booking procedure and inventory). The Second, Fourth and Fifth Circuits agree. *See United States v. Seals*, 987 F.2d 1102, 1107-08 (5th Cir.)(applying the inevitable discovery exception to evidence obtained in the illegal search of a vehicle when the officer had already decided to impound the vehicle and police department inventory procedures required the inventory of impounded vehicles), *cert. denied*, 114 S.Ct. 155 (1993); *United States v. Perea*, 986 F.2d 633, 644 (2d Cir. 1993)(holding that the contents of a bag that was illegally searched would be admissible if the items inevitably would have been discovered during a valid inventory search); *United States v. George*, 971 F.2d 1113, 1121-22 (4th Cir. 1992)(concluding that the evidence found during a search incident to an invalid arrest would be admissible if it inevitably would have been discovered pursuant to a standard inventory search of a lawfully impounded vehicle).

We believe that the existence of a routine procedure such as Northwest's policy regarding lost luggage satisfies the requirement that there be compelling facts illustrating that the disputed evidence inevitably would have been discovered.

Prior to the intervention of the airport police, Hawkins-Garner had already decided to open the suitcases pursuant to Northwest's policy of opening lost luggage. Even after the airport police arrived, Hawkins-Garner still

thought she should open the suitcase because she considered it to be in Northwest's custody. Hawkins-Garner testified that she would have opened the suitcase herself or had another employee to do so if Officer Mantel had not opened it for her. Therefore, it is clear that, pursuant to Northwest's lost luggage policy, Hawkins-Garner would have opened the black suitcase and discovered the evidence in a private search had the airport police not become involved. Because a private search was inevitable, the cocaine is admissible pursuant to the inevitable discovery exception to the exclusionary rule.

Our conclusion is bolstered by *United States v. Hernandez-Cano*, 808 F.2d 779 (11th Cir.), *cert. denied*, 482 U.S. 918 (1987), in which an x-ray of the defendant's carry-on bag revealed a large mass. The defendant voluntarily opened the bag wide enough for an airport security officer to observe a large bundle that appeared to be a white powder which could have been an explosive. When the defendant refused to permit further inspection, he was told that he could not pass through the security checkpoint. *Id.* at 780. The defendant then transferred the bundle from his carry-on bag to his checked luggage. As he passed the airport security officer, he stated that he had thrown away the bundle.

When Fleck, a ticket agent supervisor, was made aware of what had transpired, she became concerned about the safety of the aircraft. She went to the baggage area accompanied by Singleton, a police officer. *Id.* at 781. Fleck opened one of the defendant's suitcases and began to

search it by reaching in and feeling around its edges. Singleton, who had been looking over Fleck's shoulder, reached inside the suitcase and pulled out a large bundle which was later determined to be cocaine. *Id.* at 782. Fleck testified that had Singleton not reached his hand into the suitcase, it was entirely reasonable to assume that she would have completed her search and discovered the cocaine. *Id.* at 783.

This case is factually analogous to *Hernandez-Cano*. Here, Hawkins-Garner undertook a private search of the two suitcases for purposes entirely independent of the airport police. As in *Hernandez-Cano*, the private search was interrupted by police involvement. If the police had not become involved, Hawkins-Garner would have completed the private search which would have revealed the cocaine. Therefore, as in *Hernandez-Cano*, application of the inevitable discovery exception is appropriate.

Defendant argues that the police would not have relinquished control of the suitcase to Northwest, and, thus, Hawkins-Garner would not have had the opportunity to open the suitcase. Assuming *arguendo* that defendant is correct and the airport police and/or DEA had kept the suitcase, the result would have been the same. The law enforcement officers would have applied for a search warrant. If a warrant had issued, the officers would have conducted a search pursuant to that warrant; if a warrant had not issued, Northwest would have conducted a private search after the suitcase had been returned. In either case,

a search inevitably would have been conducted, and the cocaine would have been discovered.

For the foregoing reasons, we agree that the inevitable discovery exception to the exclusionary rule was properly applied by the district court in denying defendant's motion to suppress. The judgment of the district court is AFFIRMED.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARRE KENNEDY,
Defendant-Appellant.
No. 93-80790-Edmunds

United States District Court for
the Eastern District of Michigan
April 1, 1994

Before Nancy G. Edmunds,
United States District Judge

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This cause comes before the Court on Defendant's motion to suppress certain physical evidence and statements made by Defendant after his arrest. A hearing on Defendant's motion was held on February 4, 1994. For the reasons stated in this order, Defendant's motion is denied.

On July 25, 1993, defendant Arre Kennedy flew from Detroit, Michigan, to Miami, Florida, on Northwest Airlines Flight #991. He checked two pieces of luggage, a blue suitcase and a black suitcase. Defendant's luggage was misrouted by the airline and ended up at Washington's National Airport.

At National Airport, another man, Wesley Kennedy, who had flown from Detroit to Washington, found that his bags were missing and reported the problem to Northwest employee Deborah Hawkins-Garner. Ms. Garner located the two bags checked to Miami by Defendant. The airline had marked them with the name "Wesley Kennedy." Wesley Kennedy looked at the bags and told her that they were not his; he had checked a single garment bag.

At the hearing, James Biscoe, Northwest's customer service manager, testified regarding Northwest's lost baggage policy. He stated that "[i]f a bag is lost, our philosophy is . . . to . . . get the passenger and the bag back together. [If] there is no identification on the outside of the bag, we have to open the bag and . . . identify all the items . . ." Because she could not tell who owned the blue and black suitcases, Ms. Garner decided to open them. She was unable to open the black suitcase, but she found $176,000 in U.S. currency in the blue one. She immediately asked another employee to telephone the Metropolitan Washington Airport Authority.

Officer Simon Mantel responded to the call. He was shown the blue bag with the money and immediately called his supervisor, Sergeant Arthur Taplett, who arrived shortly thereafter. Because Garner, Mantel and Taplett were all concerned that the black bag might contain explosives, it was x-rayed. The x-rays were inconclusive, although Mantel testified that there did not appear to be any wire or timing devices; and no explosion seemed likely. Taplett then left the scene, while Mantel remained with the bag. Hawkins-

Garner, who apparently was still concerned with identification of the contents, asked Mantel if he would open the black bag for her. Mantel obtained permission from Taplett, who testified that "they [Northwest] wanted it open, and I said let's go ahead and do it."

Officer Mantel opened the black suitcase and found a number of brick-shaped objects wrapped in brown duct tape. The contents of the bricks were not visible through the packaging, and Officer Mantel did not attempt to open any of the bricks.

Shortly thereafter, Drug Enforcement Administration Special Agent Ed Curley arrived. He immediately recognized from the packaging and the presence of perfume that the suitcase contained controlled substances. At that point, agents conducted a field test on the contents of one of the packages. That test established that the bricks contained cocaine. Seventeen kilograms of cocaine and 77 grams of cocaine base were seized.

Shortly thereafter, Northwest Airlines in Washington received notification from Miami that defendant Arre Kennedy had arrived in Miami and was looking for his luggage. D.E.A. agents prepared for a controlled delivery of the suitcase to defendant. Defendant was arrested when he picked up the suitcases in Miami. He was advised of his Miranda rights and then confessed that he had been transporting drugs from Miami to Detroit for several months. A consent search of Defendant's Miami home yielded an additional $225,000 in U.S. currency.

Defendant filed the present motion seeking suppression of the cocaine and the suitcase based on a warrantless search. Suppression of all other evidence is requested as fruits of the illegal search. The Government initially argued that the search was constitutional for three reasons: (1) by checking his luggage onto a Northwest Airlines flight, Defendant gave his implied consent to a search if police reasonably believed explosives were present; (2) exigent circumstances existed for the search because officials believed that the luggage may have contained a bomb; and (3) the cocaine would have inevitably been discovered because airline personnel would have searched the luggage in accordance with airline policy regardless of the illegal police conduct.

Implied consent is not a viable theory. Plaintiff's implied consent argument is based on cases which hold that passengers who place hand luggage on an x-ray machine at the boarding area give implied consent to a visual inspection and limited hand search of their carry on bags. Passengers are given visual notice at that point that their carry on bags are subject to inspection and the inspection is necessary for security purposes. *United States v. Pulido-Basquerizo*, 800 F.2d 899 (9th Cir. 1986); *United States v. Herzbrun*, 723 F.2d 773 (11th Cir. 1984); *United States v. DeAngelo*, 584 F.2d 46 (5th Cir. 1978). None of those considerations are present in the case at bar. Defendant's bags were not carry-on bags nor were they searched at the boarding area. With respect to the safety issue, Defendant's bags were not being loaded

onto a flight, but rather had just arrived on an incoming flight.

Based on the testimony at the hearing, it does not appear that airport or police officials legitimately believed at the time that the second bag was opened that it contained explosives. The presence of the other suitcase weighs heavily against that theory; it is unreasonable to think that anyone would be shipping large amounts of currency on an airplane with explosives to blow it up. Moreover, Officer Mantel's decision to open the suitcase is inconsistent with a belief that explosives were present. At least two other persons were in the room with him at the time. A prudent officer fearing explosives would not risk triggering a device which might be connected to the lock or opening of the suitcase. Absent a belief that explosives were present, the only arguable basis for upholding the search is the inevitable discovery rule.

It is well established that the purpose of the exclusionary rule is to deter police from violating constitutional and statutory protections. Consistent with this purpose, the Supreme Court, in Nix v. Williams, 467 U.S. 431 (1983), held that if illegally obtained evidence would inevitably have been discovered through legal means, it is admissible. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . .the deterrence rational has so little basis that the evidence should be received." *Id.* at 444. The parties in the case at bar agree that in considering claims of inevitable discovery, the court

must consider what would have happened absent the police misconduct.

The police misconduct in this case was the warrantless search of the black suitcase, thus the Court must consider what would have happened had the illegal search not occurred.[1] Had the police acted lawfully, once the bag was seized and it was determined that it posed no danger of exploding, they would have sought a search warrant. The government concedes that under the facts of this case, it is unlikely that a search warrant would have been issued. (Government's supplemental brief at 9, n.3). If the police had been unable to secure a warrant, they would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase, pursuant to its lost luggage policy, in an effort to locate its owner.

Defendant argues that because Sgt. Taplett testified that he would have retained the suitcases after the x-ray, even if Northwest or Defendant had asked for it, Northwest could not have recovered the bag in order to conduct an inventory search. The Court agrees with the Government that,

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[1] The parties agree that under *United States v. Place*, 462 U.S. 696 (1983), airport security's initial seizure of the suitcase was lawful. (Government's supplemental brief at 9 and Defendant's response to Government' supplemental brief at 4).

> [t]his argument . . . focuses simply on the illegal 'seizure' which actually occurred, and not what would have happened absent the illegality. The fact that Sgt. Taplett would not have relinquished control of the suitcase, even after his unlawful period of temporary detention had expired and even though he lacked probable cause to retain it, merely underscores the fact that he had unlawfully 'seized' it. The teaching of the inevitable inventory search cases cited in the government's Supplemental Brief, however, is that one must ignore all of the illegal conduct, and look to see what then would have happened. The proper application of the inevitable discovery rule can only lead to the conclusion that, absent the illegal retention ('seizure') of the suitcase, the airport police would have returned the suitcase to Northwest, which would have searched it.

Government's Supplemental Reply Brief at 2-3, footnote omitted, emphasis in original). Because a search of the black bag by Northwest, like its search of the blue bag, would have been a search by a private, rather than a public, entity, the search would not have violated the Fourth Amendment.

For the foregoing reasons, the Court finds that the cocaine would have inevitably been discovered by Northwest Airlines and Defendant's motion to suppress is hereby

DENIED. Because the initial search was legal, the fruits of that search, including Defendant's statements to police in Miami, are also admissible.

Nancy G. Edmunds
U.S. District Judge

Dated: April 1, 1994

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARRE KENNEDY,
Defendant-Appellant.
No. 94-1985

United States District Court for
the Eastern District of Michigan
September 25, 1995

ORDER

Before MILBURN and BATCHELDER, Circuit Judges,
and TODD, District Judge

*Hon. James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation

This court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

(2)

Supreme Court, U.S.
FILED
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No. 95-1043

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARRE KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the court of appeals correctly ruled that narcotics evidence was admissible under the inevitable discovery exception to the exclusionary rule.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 61 F.3d 494. The order of the district court denying petitioner's motion to suppress (Pet. App. 19-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1995. The court of appeals denied a petition for rehearing on September 25, 1995. Pet. App. 27. The petition for a writ of certiorari was filed on December 26, 1995 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-18.

1. On July 25, 1993, petitioner flew from Detroit, Michigan, to Miami, Florida, on Northwest Airlines (Northwest). He checked two locked pieces of luggage, a blue suitcase and a black suitcase. Northwest mistakenly labeled petitioner's suitcases with tags bearing the name of Wesley Kennedy, a Northwest passenger unrelated to petitioner. As a result, petitioner's suitcases were misrouted and sent to National Airport in Washington, D.C. At National Airport, Wesley Kennedy, who had flown from Detroit to Washington, discovered that his own bag was missing and reported the problem to Deborah Hawkins-Garner, a Northwest employee. Hawkins-Garner showed petitioner's two suitcases to Wesley Kennedy, who informed her that the suitcases were not his. Pet. App. 2.

Northwest's policy regarding lost luggage was to open the suitcase to check for identification and, if there was no identification, to inventory the contents. Pursuant to that policy, Hawkins-Garner decided to open the suitcases to see if they contained any identification. She was unable to open the black suitcase because it had a combination lock. She was able to open the blue suitcase because it had a lock that could be opened with a Northwest key. The blue

suitcase contained $176,000, which was promptly reported to the Metropolitan Washington Airport Authority Police Department. Pet. App. 2-3, 20.

Officer Simon Mantel responded and was later joined by Sergeant Arthur Taplett. Sergeant Taplett's suspicions were aroused by a strong odor of perfume emanating from the black suitcase. Concerned that the suitcase might contain explosives, Sergeant Taplett had it x-rayed. That process revealed a number of dense, rectangular-shaped objects. Officer Mantel stayed with the suitcases while Sergeant Taplett arranged to move the suitcases to the airport police station. Pet. App. 3.

At that point, Hawkins-Garner decided to open the black suitcase. After receiving permission from her supervisor to open the bag, she obtained a hammer and a screwdriver and asked Officer Mantel to open it for her. Sergeant Taplett advised Officer Mantel that he could open the suitcase if Northwest wanted it opened. Officer Mantel then used the hammer and screwdriver to force open the lock on the suitcase. The suitcase was subsequently determined to contain 17 kilograms of cocaine and 77 grams of cocaine base. Pet. App. 3-4.

Shortly thereafter, Northwest in Washington, D.C., was notified that petitioner had arrived in Miami and was looking for his suitcases. Drug Enforcement Administration agents arranged for a controlled delivery of the suitcases to petitioner. The next day, petitioner was arrested after he picked up the suitcases in Miami and admitted that the suitcases belonged to him. Petitioner confessed that he had been trafficking drugs from Miami to Detroit for several months. A consensual search of peti-

tioner's home produced an additional $225,000 in cash. Pet. App. 4.

2. Petitioner was indicted on cocaine trafficking charges and moved to suppress the cocaine seized from his black suitcase and the indirect fruits of that search. The district court denied the motion based on the inevitable discovery exception to the exclusionary rule. Pet. App. 19-26. In denying the motion to suppress, the district court determined that absent the illegality, the airport police would have returned the suitcase to Northwest, which would have searched it under its standard policy:

> The police misconduct in this case was the warrantless search of the black suitcase, thus the Court must consider what would have happened had the illegal search not occurred. Had the police acted lawfully, once the bag was seized and it was determined that it posed no danger of exploding, they would have sought a search warrant. The government concedes that under the facts of this case, it is unlikely that a search warrant would have been issued. If the police had been unable to secure a warrant, they would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase, pursuant to its lost luggage policy, in an effort to locate its owner.

Id. at 24 (footnote and citation omitted). Because the action of Northwest in opening the bag would have been a "search" by a private entity rather than the police, the district court concluded that the Fourth Amendment would not have been violated. *Id.* at 25. Following the denial of his motion to suppress, petitioner entered a conditional plea of guilty to con-

spiring to distribute cocaine, in violation of 21 U.S.C. 846, reserving his right to appeal the denial of the motion.

3. The court of appeals affirmed. Pet. App. 1-18. It agreed with the district court that the evidence resulting from the warrantless search of the black suitcase would inevitably have been discovered by lawful means. The court of appeals recognized that the inevitable discovery exception requires proof that the evidence inevitably would have been acquired through lawful means had the government misconduct not occurred. *Id.* at 7, citing *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). Further, the court noted that proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts," and that the exception requires the district court to "determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." Pet. App. 7.

The court of appeals noted that decisions in other circuits had announced divergent positions on the question whether the inevitable discovery exception requires proof that at the time of the illegal search a separate independent line of police investigation was underway. See Pet. App. 8-9. It then ruled that, because the exception ultimately turns on the ineluctability of discovery rather than a specific means of discovery, "the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate *either* the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered." *Id.* at 13.

Applying that standard, the court of appeals held that the disputed evidence in this case inevitably would have been discovered. Pet. App. 13-17. The court of appeals relied in large measure on the existence of Northwest's "routine procedure" in opening lost luggage for identification purposes. *Id.* at 15. The court observed:

> Prior to the intervention of the airport police, Hawkins-Garner had already decided to open the suitcases pursuant to Northwest's policy of opening lost luggage. Even after the airport police arrived, Hawkins-Garner still thought she should open the suitcase because she considered it to be in Northwest's custody. Hawkins-Garner testified that she would have opened the suitcase herself or had another employee to do so if Officer Mantel had not opened it for her. Therefore, it is clear that, pursuant to Northwest's lost luggage policy, Hawkins-Garner would have opened the black suitcase and discovered the evidence in a private search had the airport police not become involved. Because a private search was inevitable, the cocaine is admissible pursuant to the inevitable discovery exception to the exclusionary rule.

Id. at 15-16.*

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* The court of appeals also rejected petitioner's argument that the inevitable discovery exception should not apply because the law enforcement officers might not have relinquished control of the black bag to Northwest. If the officers had maintained custody of the bag to seek a warrant, the court of appeals pointed out, the officers would have conducted a search pursuant to that warrant; if a warrant had not issued, Northwest would have conducted a private search after the suitcase had been returned. In either case, the court con-

ARGUMENT

1. The inevitable discovery doctrine permits illegally seized evidence to be admitted at trial where the government establishes "that the information ultimately or inevitably would have been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. at 444. Petitioner contends (Pet. 9-13) that the decision of the court below conflicts with decisions from the Fifth, Tenth, and Eleventh Circuits that, he suggests, bar the application of the inevitable discovery exception unless the government can demonstrate the existence of "a previously initiated independent line of investigation." Pet. 10. Although there is some disagreement among the courts of appeals in the description of the circumstances in which the inevitable discovery exception may apply, the present case is not in conflict with the holding of any other court of appeals.

Petitioner first relies on *United States* v. *Owens*, 782 F.2d 146, 152-153 (10th Cir. 1986), a case involving an unconstitutional police seizure of cocaine from a closed bag inside a closed dresser drawer in a motel room after the occupant had been arrested outside. The government argued in *Owens* that the inevitable discovery exception should apply because the motel maid's routine cleaning for the next occupant would have revealed the contraband. Because "[s]everal factors suggest[ed] that motel employees performing routine cleaning may not have inevitably discovered the cocaine," the court of appeals rejected the government's argument. *Id.* at 153. The factors con-

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cluded, a lawful search inevitably would have been conducted, and the cocaine would have been discovered. Pet. App. 17-18.

sidered in *Owens* included: (1) the possibility that motel staff might not have found, or opened, the small closed container of cocaine; (2) that in view of the lack of any police involvement in routine room cleaning the motel staff might not have recognized the cocaine or turned the drugs over to the police; (3) that absent the illegal search, the occupant might have posted bail and returned to the motel room before the cleaning staff; and (4) that a friend of the occupant could have claimed the closed bag. Those factors led the *Owens* court to reject the application of the inevitable discovery exception because it was "highly speculative" whether discovery of the contraband was inevitable. *Ibid.* The decision in *Owens* does not conflict with the conclusion of the court below that in this case, a private search by Northwest under its standard procedures was inevitable. See *United States* v. *Woody*, 55 F.3d 1257, 1270 (7th Cir.) (evidence in automobile would inevitably have been discovered in subsequent mandatory inventory), cert. denied, 116 S. Ct. 234 (1995); *United States* v. *Horn*, 970 F.2d 728, 732 (10th Cir. 1992) (inevitable discovery doctrine applied where weapons found in an automobile during a roadside stop would inevitably have been discovered in a subsequent inventory following impoundment).

Petitioner also relies upon *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), in which the court of appeals wrote that application of the inevitable discovery exception requires, among other things, proof "that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *Id.* at 1206. Unlike this case and *Owens*, *Cherry* did not involve any question of an inevitable lawful search by a private party. Rather, the entire investigation in

Cherry was conducted by government officers, and the question presented was whether a lawful search conducted by those officers was inevitable. Because of a concern that the exception would "swallow the rule" if it allowed otherwise tainted evidence to be admitted "merely because the police could have chosen to act differently and obtain the evidence by legal means," the *Cherry* court required not only proof that the evidence would have been discovered in any event, but also proof that the police were actively pursuing a substantial alternate line of investigation at the time of the misconduct. *Id.* at 1205-1206. *Cherry* thus did not address the circumstances in which an inevitable private search might allow the application of the inevitable discovery exception.

Similarly, in *United States* v. *Satterfield*, 743 F.2d 827, 845-847 (11th Cir. 1984), the court rejected the government's argument that a weapon illegally seized from under sofa cushions at the defendant's residence should have been admitted under the inevitable discovery exception because it would have been found in a later warrant-authorized search. Because the court believed that the police should not be allowed to forgo obtaining a warrant until after their search has disclosed the presence of the evidence, it required that "the police must possess and be actively pursuing the lawful avenue of discovery when the illegality occurred." *Id.* at 847. As in *Cherry*, *Satterfield* did not resolve the requirements for an application of the inevitable discovery exception founded on the inevitability of a private search.

The court below correctly concluded that the inevitable discovery exception was applicable in this case because of the Northwest policy regarding the opening of lost luggage. The court of appeals appro-

priately did not require that a separate and independent government investigation be in progress at the time of the police misconduct, but it did require proof of "compelling facts establishing that the disputed evidence inevitably would have been discovered." Pet. App. 13. That standard was more than adequate to ensure, in the context of the claim that later events would have led to a lawful *private* search, and thus that the discovery of the evidence was truly inevitable. See *United States* v. *Boatwright*, 822 F.2d 862, 864-865 (9th Cir. 1987) (Kennedy, J.) (suggesting that development of inevitable discovery doctrine proceed on a "case by case" basis).

2. Petitioner also contends (Pet. 14-21) that the government did not sufficiently demonstrate that a lawful search of the black suitcase was inevitable here. Based on the evidence adduced at the suppression hearing both the district court and the court of appeals determined that the contraband in petitioner's black suitcase inevitably would have been discovered. The routine procedure of Northwest to open and inventory lost luggage, a procedure that was in fact being employed by the Northwest employee on the scene, fully sufficed in the circumstances here to establish that the disputed evidence inevitably would have been discovered. See Pet. App. 13-18. That factbound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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